Mardale Pipes Plus Ltd v Malaysian International Trading Corp (Japan) Sdn Bhd (ExxonMobil Exploration and Production Malaysia Inc, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–1308 OF 2006
MARY LIM JC
20 FEBRUARY 2009

Civil Procedure — Summary judgment — Appeal — Claim for goods sold and delivered — Whether LAD clause applied — Whether triable issues raised by defendant

Contract — Damages — Liquidated ascertained damages — Claim for goods sold and delivered — Whether LAD clause applied — Whether defendant could claim LAD when no notice was given at time of acceptance of intention to claim LAD — Contracts Act 1950 s 56

The plaintiff was awarded the contract to supply duplex stainless steel piping materials ('the goods') to the defendant. It was an express term in the letter of award that time was of the essence of the contract, especially as the goods were intended for delivery to ExxonMobil Exploration and Production Malaysia Inc ('ExxonMobil'). There was also a provision for the imposition of liquidated damages for such delay in delivery ('the LAD clause'). The plaintiff delivered the goods to the defendant, and nine invoices totalling €255,267.26 for various shipments of goods between 2004 and 2006 were issued. When the defendant refused to settle the sum claimed, the plaintiff issued a letter of demand for the €255,267.26. The defendant contested the claim on the grounds, inter alia, that LAD was occasioned by the plaintiff's failure to ensure timely readiness of the delivery of the goods, which sum was substantially the same as that imposed by ExxonMobil. The defendant therefore claimed a right to set-off the damages for the losses suffered. In the meantime the plaintiff applied for summary judgment. The senior assistant registrar who heard the application entered summary judgment against the defendant for the sum of €22,923.23 instead of the whole of the plaintiff's claim. The plaintiff appealed against this judgment on the grounds that summary judgment ought to have been entered on the whole sum of €255,267.26. The defendant appealed on the grounds that summary judgment ought not to have been entered for the sum of €22,923.23 because there were triable issues in the case. The plaintiff maintained that the requisite

conditions for summary judgment had been met as it had acted in accordance with the terms of the contract and delivered the goods to the defendant and that the goods had been accepted by the defendant. Insofar as LAD was concerned, the plaintiff relied on s 56(3) of the Contracts Act 1950 ('the Act') and submitted that since the defendant had chosen to accept a late delivery where time was of the essence of the contract and had not given notice at the time of acceptance of his intention to claim damages for late delivery, it was not entitled to LAD. Therefore the plaintiff contended that the defendant had no bona fide defence and had not raised any triable issues. The defendant on the other hand submitted that there was not a true time was of the essence clause as there was a LAD clause and that a trial would be necessary to determine the intention of the parties as that was a question of fact. The defendant further submitted that LAD was occasioned by the plaintiff's failure to ensure timely readiness of the delivery of the goods and that late delivery to the defendant resulted in late delivery to ExxonMobil. In addition the defendant disputed the application of s 56(3) of the Act to the present case on the grounds, inter alia, that s 56(3) of the Act did not apply where there was an LAD clause. In the circumstances the defendant maintained that summary judgment ought not to have been entered because the question as to whether there was timely readiness for delivery of the goods, whether LAD was rightly imposed and whether the defendant should have given notices for the imposition of LAD were triable issues.

Held, allowing the plaintiff's appeal with costs and dismissing the defendant's appeal with costs:

(1) It was an undisputed fact that the plaintiff had delivered the goods to the defendant and that the defendant had refused to settle the sum outstanding of €255,267.26 for the goods. Thus in the absence of a valid defence the plaintiff's claim was proved and summary judgment ought to be entered (see para 20).

(2) In most commercial contracts, it would be agreed between the parties that time was of essence. As such, non-performance by the due dates allowed the innocent party to treat the contract as voidable, that is, to reject late delivery. In the present case, it was agreed between the parties that in the event of a delay the plaintiff was obliged to notify the defendant immediately giving reasons for the delay and this fortified the fact that it was the intention of the parties to make time absolutely essential to their contract. Despite time being of the essence of this contract, no notice was given by the defendant at the material time of

A acceptance of the goods, of its intention to claim for damages for delivery at dates other than those stipulated in the orders. Therefore the issue of damages for late delivery did not arise and the formula for computation of LAD could not be invoked. In fact the LAC clause could only be invoked when a notice under s 56(3) of the Act had been B properly given by the defendant. The plaintiff was entitled to treat the delivery as being accepted by the defendant without issue and the delivery would not set the LAD clause into operation (see paras 23–28, 30–31).

C (3) The cases cited by the defendant were that which concerned agreements for the sale and purchase of houses and the wording of the LAD clause in those contracts were distinctly different from the LAD clause in the present contract. In the present case, the terms of the contract were arrived at by the parties freely and the language in the LAD clause was D quite different (see para 29).

[Bahasa Malaysia summary

Plaintif telah diberikan kontrak untuk membekalkan bahan-bahan paip E keluli tahan karat dupleks ('barangan tersebut') untuk defendan. Ia suatu terma nyata dalam award tersebut bahawa masa adalah intipati kontrak, terutamanya barangan tersebut adalah untuk tujuan penghantaran kepada ExxonMobil Exploration and Production Malaysia Inc ('ExxonMobil'). Terdapat juga peruntukan pengenaan ganti rugi jumlah tertentu bagi F kelewatan penghantaran ('klausa LAD'). Plaintif menghantar barangan tersebut kepada defendan, dan sembilan invois berjumlah €255,267.26 untuk pelbagai penghantaran barangan tersebut di antara 2004 hingga 2006 telah dikeluarkan. Apabila defendan enggan menyelesaikan jumlah yang dituntut, plaintif menghantar surat tuntutan bagi jumlah €255,267.26. G Defendan mempertikaikan tuntutan tersebut atas alasan-alasan, antara lain, bahawa LAD telah berlaku disebabkan oleh kegagalan plaintif untuk memastikan kesediaan masa penghantaran yang tepat bagi barangan tersebut, yang mana jumlahnya adalah pada matannya sama dengan yang dikenakan oleh ExxonMobil. Defendan oleh itu mendakwa suatu hak untuk penolakan H terhadap ganti rugi bagi kerugian-kerugian yang dialami. Sementara itu, plaintif memohon untuk penghakiman terus. Penolong kanan pendaftar yang mendengar permohonan itu mencatatkan penghakiman terus terhadap defendan untuk jumlah sebanyak €22,923.23 daripada jumlah keseluruhan tuntutan plaintif. Plaintif merayu terhadap penghakiman ini atas alasan I bahawa penghakiman terus sepatutnya diberikan atas keseluruhan jumlah €255,267.26. Defendan merayu atas alasan bahawa penghakiman terus tidak harus diberikan untuk jumlah €22,923.23 kerana terdapat isu-isu untuk dibicarakan dalam kes ini. Plaintif mempertahankan bahawa syarat-syarat yang diperlukan untuk penghakiman terus telah dipenuhi kerana ia telah

bertindak menurut terma-terma kontrak tersebut dan menghantar barangan tersebut kepada defendan dan barangan tersebut telah diterima oleh defendan. Setakat yang berkenaan dengan LAD, plaintif bergantung pada s 56(3) Akta Kontrak 1950 ('Akta tersebut') dan telah menghujahkan bahawa memandangkan defendan yang telah memilih untuk menerima penyerahan lewat di mana masa adalah intipati kontrak dan tidak memberi apa-apa notis semasa penerimaan mengenai niatnya untuk menuntut ganti rugi bagi penyerahan lewat, ia tidak berhak untuk LAD. Oleh itu plaintif menyatakan bahawa defendan itu tidak mempunyai pembelaan yang bona fide dan tidak menimbulkan apa-apa isu untuk dibicarakan. Defendan sebaliknya menghujahkan bahawa tidak terdapat satu klausa masa adalah intipati yang sebenar-benarnya kerana wujudnya satu klausa LAD dan perbicaraan adalah perlu untuk menentukan niat pihak-pihak kerana ianya adalah satu persoalan fakta. Defendan seterusnya menghujahkan bahawa LAD disebabkan oleh kegagalan plaintif untuk memastikan kesediaan masa penghantaran yang tepat bagi barangan tersebut dan penyerahan lewat kepada defendan telah mengakibatkan penyerahan lewat kepada ExxonMobil. Tambahan lagi defendan mempertikaikan penggunaan s 56(3) Akta tersebut bagi kes ini atas alasan, antara lain, bahawa s 56(3) Akta tersebut tidak terpakai apabila wujudnya klausa LAD. Dalam keadaan itu defendan mempertahankan bahawa penghakiman terus tidak sepatutnya dimasukkan kerana persoalan sama ada terdapat kesediaan masa penghantaran yang tepat bagi barangan tersebut, sama ada LAD telah dengan betulnya dikenakan dan sama ada defendan seharusnya memberikan notis untuk pengenaan LAD adalah merupakan isu-isu untuk dibicarakan.

Diputuskan, membenarkan rayuan plaintif dengan kos dan menolak rayuan defendan dengan kos:

(1) Ia adalah satu fakta yang tidak dapat dipertikaikan bahawa plaintif telah menyerahkan barangan tersebut kepada defendan dan defendan enggan menyelesaikan jumlah tertunggak sebanyak €255,267.26 untuk barangan tersebut. Oleh itu dalam ketiadaan satu pembelaan yang sah tuntutan plaintif adalah terbukti dan penghakiman terus sepatutnya dicatatkan (lihat perenggan 20).

(2) Dalam kebanyakan kontrak komersial, adalah dipersetujui antara pihak-pihak bahawa masa merupakan intipati kontrak. Oleh itu, ketaklaksanaan pada tarikh-tarikh matang membenarkan pihak yang tidak bersalah untuk menganggap kontrak itu sebagai boleh batal, iaitu, untuk menolak penyerahan lewat. Dalam kes ini, ia telah dipersetujui antara pihak-pihak bahawa jika berlaku kelewatan plaintif berkewajipan

memberitahu defendan serta-merta dengan memberi sebab-sebab untuk kelewatan dan ini mengukuhkan fakta bahawa ia adalah niat pihak-pihak untuk menjadikan masa benar-benar penting untuk kontrak mereka. Walaupun masa adalah intipati kontrak ini, tiada notis yang diberi oleh defendan pada masa-masa penerimaan barangan tersebut, mengenai niatnya untuk menuntut ganti rugi bagi penghantaran pada tarikh selain daripada yang dinyatakan dalam tempahan-tempahan itu. Oleh itu isu mengenai ganti rugi untuk penyerahan lewat tidak timbul dan formula untuk pengiraan LAD tidak boleh digunakan. Sebenarnya klausa LAD cuma boleh digunakan apabila suatu notis di bawah s 56(3) Akta telah dengan sahnya diberikan oleh defendan. Plaintif berhak untuk menganggap penyerahan tersebut telah diterima oleh defendan tanpa masalah dan penyerahan itu tidak akan mengaktifkan operasi klausa LAD (lihat perenggan 23–28, 30–31).

(3) Kes-kes yang dirujuk oleh defendan adalah kes-kes yang berkenaan dengan perjanjian-perjanjian jual beli rumah dan penyusunan kata-kata klausa LAD dalam kontrak-kontrak itu adalah amat berbeza daripada klausa LAD dalam kontrak ini. Dalam kes ini, terma-terma bagi kontrak telah dicapai oleh pihak-pihak secara bebas dan bahasa dalam klausa LAD adalah agak berbeza (lihat perenggan 29).]

Notes

For cases on appeal of summary judgment, see *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

For cases on liquidated damages, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3312–3335.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Foong Weng Tat v Vu Siew Chin [1974] 2 MLJ 20, FC (refd)

Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd [2003] 1 MLJ 22, HC (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Noh Hyoung Seok v Perwira Affin Bank Bhd [2004] 2 MLJ 203; [2004] 2 CLJ 64, CA (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)

South East Asia Insurance Bhd v Kerajaan Malaysia [1998] 1 AMR 657, CA (refd)

Tai Kim Yew & Ors v Sentul Raya Sdn Bhd [2004] 4 MLJ 227, HC (refd)

Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors [1996] 4 MLJ 331, HC (refd)

Tunjang Wawasan Sdn Bhd v TNB Generation Sdn Bhd [2007] MLJU 362, HC (distd)
Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd [2005] 6 MLJ 555; [2007] 3 CLJ 176, HC (refd)
Yeow Kim Pong Realty Ltd v Ng Kim Pong [1962] MLJ 118, PC (refd)

Legislation referred to
Contracts Act 1950 s (1), 56(3)
Housing Developers (Control and Licensing) Act 1966
Rules of the High Court 1980 O 14

James Khong (Sreenevasan) for the plaintiff.
T Kuhendran (Aniz Ahmad Amirudin with him) (Zul Rafique & Partners) for the defendants.
Dorothy Goh (Raja Darryl & Loh) for the third party.

Mary Lim JC:

[1] At the outset of these proceedings I had sought clarification on some of the references in the affidavits that do not appear to match the information as appearing in the exhibits attached. I am now satisfied after hearing the explanations given; much is due to typographical error and the peculiarities of the business of these particular transactions. It must be stated that the defendant did not appear, at any time to be handicapped in any way by the contents of the affidavits for which this court had sought clarifications.

[2] There are two appeals for disposal — encls 29 and 30 by the plaintiff and defendant respectively. Both parties are appealing appeal against the decision of the learned senior assistant registrar ('SAR') given on 25 January 2008. The learned SAR had refused to enter summary judgment on the whole of the plaintiff's claim (€255,267.26) save for the sum of €22,923.23. The plaintiff's case is that summary judgment ought to have been entered for the full sum whilst the defendant maintains that summary judgment ought not to have been entered for the sum of €22,923.23 or at all.

BACKGROUND FACTS

[3] The facts in this case are not in dispute.

[4] The plaintiff was awarded a contract to supply the defendant duplex stainless steel piping materials for a Guntong E-Project ('goods'). These goods in turn were intended for delivery to ExxonMobil Exploration and Production Malaysia Inc (ExxonMobil). The contract price was fixed free on board ('FOB') port of export located in the United Kingdom, France,

Germany and Italy in accordance with INCOTERMS 2000 Ed. The contract price was inclusive of inspection, testing, transportation, packing, training and other related charges.

[5] It was an express term in the letter of award that time was of the essence of the contract. In the event of a delay the plaintiff was obligated to notify the defendant immediately in writing giving reasons for the delay. There was further a provision for the imposition of liquidated damages for such delay. It would be useful to set out the relevant provision:

> LIQUIDATED DAMAGES
>
> The time stipulated for delivery of GOODS in the LETTER OF AWARD shall be of essence. SUPPLIER agree to effect delivery of GOODS on or before the stipulated delivery schedule. If for any reason, delivery shall be delayed, SUPPLIER to notify MITCO JAPAN immediately in writing, giving reason(s) for such delay. For late delivery of GOODS, liquidated damage (LD) of 1% a week or part thereof of slippage from the agreed delivery period/date stipulated up to the maximum of 10% of contract value shall be imposed.

[6] Under the FOB contracts the defendant issued purchase orders which are confirmed by the plaintiff vide confirmation orders. Delivery dates are specified in these orders. The parties have respective obligations, the plaintiff to take steps to supply the goods ordered and the defendant to nominate the port and vessel for the loading of those goods.

[7] In a FOB contract the duty of the plaintiff ends when the goods ordered are put on board the nominated vessel at the nominated port.

[8] It is not in dispute that the plaintiff delivered the goods to the defendant. Nine invoices totalling €255,267.26 for various shipments of goods between 2004 and 2006 were issued. It is also not in dispute that the defendant has refused to settle the sum claimed. In response to the plaintiff's letter of demand sent through their then solicitors (P27 in encl 9), the defendant contested the claim on several reasons: imposition of LAD; costs for testing, inspection and rectification, and logistics costs for vendor data report (exh 'II-7' in encl 12).

[9] It may also be said that the goods that form the subject matter of this claim were not delivered on or by the dates specified in the purchase and confirmation orders. The issue now is whether the liquidation clause applies.

SUBMISSIONS

[10] The law is settled in O 14 of the Rules of the High Court 1980 applications. Summary judgment is entered where there are no defences or triable issues to the plaintiff's claim.

[11] Learned counsel for the plaintiff maintains that the requisite conditions for summary judgment have been met. He submitted that the goods delivered on board defendant nominated vessels and at defendant nominated ports had been accepted by the defendant. Such arrangements were in accordance with the terms of the contract.

[12] There was also never any complaint of delay. No evidence of any communication between the parties regarding this was adduced. Learned counsel submitted that the imposition of the LAD was an 'after thought' raised after the plaintiff's letter of demand for payment had been sent.

[13] In so far as the LAD is concerned, the plaintiff relies on s 56(3) of the Contracts Act 1950. According to learned counsel, since time was of the essence for the performance of this contract, non-performance on or by the stipulated time means that the defendant may rescind the contract and refuse a late delivery of goods. In this case the defendant chose to accept the goods. If the defendant chooses to accept a late delivery where time is of the essence of the contract, s 56(3) requires the defendant to give notice at the time of acceptance of his intention to claim damages for late delivery. See *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331.

[14] No notice of such intention to claim damages or LAD for late delivery of the goods was ever given. There is therefore no bona fide defence or triable issues raised.

[15] In response learned counsel for the defendant amplified the reasons for the imposition of LAD of €229,218.44 and the reasons behind the refusal to pay. It was submitted that time was not of essence. It was not a true time is of the essence clause as there was also a LAD clause. A trial would be necessary to determine the intention of the parties as that it is a question of fact.

[16] It was further maintained that LAD was occasioned by the failure to ensure timely readiness of the delivery of the goods. This amount was

substantially the same sum as that imposed by ExxonMobil. Late delivery to the defendant resulted in late delivery to ExxonMobil. The delay also resulted in the defendant having to reshuffle their entire logistics plan with increased costs. Goods delivered had incomplete documentation and additional expense was incurred to make good such documentation. There were also claims for rectification and customs charges. The defendant claimed therefore a right to set-off the damages for the losses suffered.

[17] Learned counsel for the defendant contended that these facts give rise to several triable issues and questions, namely:

(a) whether there was timely readiness for delivery of the goods;

(b) whether LAD had been rightly imposed; and

(c) whether the defendant should have given notices for the imposition of late delivery charges or the LAD.

[18] The defendant disputed the application of s 56(3) relying on a line of authorities like *Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd* [2005] 6 MLJ 555; [2007] 3 CLJ 176; *Hariram a/l Jayaram & Ors v Sentul Raya Sdn Bhd* [2003] 1 MLJ 22, *Tai Kim Yew v Sentul Raya Sdn Bhd* [2004] 4 MLJ 227. In substance these cases held the view that s 56(3) did not apply and that it was not necessary to give notice before a right to impose LAD charges arose under a LAD clause. Further s 56(3) does not apply where there is an LAD clause (see the unreported High Court decision in *Tunjang Wawasan Sdn Bhd v TNB Generation Sdn Bhd* [2007] MLJU 362).

[19] It was further submitted that summary judgment ought not to be entered where triable issues or questions are raised. The test is whether these issues are fair, reasonable or bona fide defences. The defences do not have to be complete (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, *South East Asia Insurance Bhd v Kerajaan Malaysia* [1998] 1 AMR 657, *Noh Hyoung Seok v Perwira Affin Bank Bhd* [2004] 2 MLJ 203; [2004] 2 CLJ 64, *Foong Weng Tat v Vu Siew Chin* [1974] 2 MLJ 20). The three issues identified are submitted to be so triable.

DECISION

[20] To my mind the issue is clear. As far as the plaintiff's claim is concerned, the goods have been delivered and the defendant has not paid for them. In the absence of a valid defence the plaintiff's claim is proved and summary judgment ought to be entered. The issue then is whether those three issues raised by the defendant are triable. The three issues really revolve around the interpretation and application of the liquidated damages clause.

[21] Taken at its worst for the plaintiff, the question is where the plaintiff has failed to make timely delivery can the defendant impose LAD without notice at the time of acceptance of late delivery? Whilst this question is valid can it be summarily disposed? Is a trial necessary for its determination? A

[22] The answer is in the negative. Whilst it is a defence it is not reasonable given the facts and circumstances of the case. My reasons are as follows. B

[23] The parties here negotiated at arm's length the terms of this written contract which clearly evinces the intention of the parties. In it the parties have agreed that time shall be of essence. Such is usually the case in commercial contracts. This is no different. This simply means performance at agreed times was critical. Non-performance by the due dates allows the innocent party to treat the contract as voidable, that is, to reject late delivery. This position under common law is enshrined in s 56(1) of the Contracts Act 1950. C D

[24] However an innocent party may nevertheless choose to accept a late delivery. But where he chooses to do so and wants to claim for any damages for late delivery he must notify the other party of this intention at the time of acceptance of late delivery. This too is encapsulated in s 56(3) of the Contracts Act 1950. E

[25] Several affidavits and affidavits in reply have been filed on behalf of the parties. This application for summary judgment was made before any defence was filed. From the statement of claim and the documents filed by both parties and as mentioned earlier, it is clear that delivery of the goods were never made on or before the dates stipulated in the numerous purchase and confirmation orders. In fact evidence was led by both parties to show delivery at dates frequently later than the dates stipulated. F G

[26] As agreed between the parties when such an event occurs, the plaintiff's duty was to immediately inform the defendant of the delay and to give reasons for such delay. This, to me, fortifies the issue that it was the intention of the parties to make time absolutely essential to their contract. The parties further agreed that where there is late delivery LAD calculated according to the formula set out will be imposed. H

[27] No evidence was led of the plaintiff informing the defendant that delivery was to be at dates other than those stipulated in the orders. Neither I

A was there any evidence of any complaint by the defendant of such failure. Despite time being of the essence of this contract, no notice was ever given by the defendant at the material time of acceptance of goods, of its intention to claim for damages for delivery at dates other than those stipulated in the orders. Instead the parties carried on with the performance of the contract.

B

[28] In such an instance the issue of damages for late delivery does not arise. The formula provided for computation of LAD is therefore not invoked.

C

[29] The cases cited by learned counsel for the defendant are peculiar to the facts and law applicable. Those cases concern agreements for the sale and purchase of houses premised on standard form contracts as provided under the Housing Developers (Control and Licensing) Act 1966. The wording in the LAD clause there is distinctly different from that in this contract. There D the presence of the words 'shall pay immediately' in the clause was given a purposive interpretation, meaning automatically attracting the invocation of the LAD without the need to issue a notice at the time of acceptance of late delivery. Otherwise that phrase used by the parties would be 'meaningless' E (see *Tai Kim Yew v Sentul Raya Sdn Bhd* [2004] 4 MLJ 227 at p 316). This is not the case here. The terms of the contract were arrived at by the parties freely and the language in the LAD clause is quite different.

[30] I am of the view that this clause operates only when a notice under F s 56(3) has been properly given. Once that has been established then compensation for the late delivery will be computed on the LAD formula as given.

[31] Since no notice was given at the time of acceptance of delivery at dates G other than those stipulated in the orders then the plaintiff is entitled to treat the delivery as being accepted by the defendant without issue. Such delivery would not set the LAD clause into operation. This is quite different from the facts in *Tunjang Wawasan Sdn Bhd v TNB Generation Sdn Bhd* where the H defendant gave notice of intention to deduct the sum stipulated in the LAD clause at the material time.

[32] The defence as proposed in the three issues or questions offered by the defendant is therefore not triable.

I

[33] By reason of the above, encl 29 is allowed with interest and costs and encl 30 is dismissed with costs.

Plaintiff's appeal allowed with costs, defendant's appeal dismissed with costs.

Reported by Kohila Nesan